

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7535

Investigation into petition of AARP, for the)
establishment of reduced rates for low-income)
consumers of Green Mountain Power Corporation and)
Central Vermont Public Service Corporation, as)
expanded to possibly include general applicability to all)
Vermont retail electric utilities)

Order entered: 8/9/2010

ORDER DENYING SUMMARY JUDGMENT MOTION

I. INTRODUCTION

In this Docket, the Vermont Public Service Board ("Board") is considering the establishment of reduced rates for low-income electricity consumers in Vermont. In this Order, I deny a motion for summary judgment (the "DPS Motion") filed by the Vermont Department of Public Service ("Department" or "DPS").

II. PROCEDURAL BACKGROUND

On May 19, 2009, AARP filed a petition, pursuant to 30 V.S.A. § 218(e), requesting that the Board establish reduced rates for low-income residential customers in the service territories of Green Mountain Power Corporation ("GMP") and Central Vermont Public Service Corporation ("CVPS") (hereinafter the "AARP Petition").

On July 21, 2009, the Board issued an Order opening an investigation "to consider the establishment of reduced rates for low-income residential customers of Green Mountain Power Corporation and Central Vermont Public Service Corporation."¹

On August 4, 2009, a prehearing conference was convened in this docket. At that hearing, the Department raised the issue of whether this docket should include consideration of

1. Docket 7537, Order dated 7/21/09 at 1.

implementing a statewide obligation for all electric utilities to provide a reduced-rate program for low-income electric customers, as opposed to limiting this docket to consideration of a low-income program only in the service territories of GMP and CVPS.²

On August 11, 2009, the Department filed a letter stating that, after discussions with several other Vermont electric utilities, the DPS had concluded "it would be better in terms of equity and efficiency to include the other utilities at this time" in the investigation under way in this docket.³ The Department cited three reasons for this position: (1) if creating a low-income rates program is found to be appropriate as a matter of public policy in Vermont, then "all consumers in the state should potentially be allowed to share in the benefits and costs;" (2) if there is "a good chance that any program arrived upon through this proceeding may be applied to the other utilities, it makes sense to include the other utilities up front in the interest of judicial economy so we don't have two proceedings;" and (3) the other utilities might provide valuable contributions to this proceeding.⁴

On September 21, 2009, the Board issued an Order expanding the scope of this proceeding to "include consideration of program-related issues, including design, that may have application beyond the service territories" of GMP and CVPS.⁵

On June 17, 2010, the Department filed the DPS Motion in which it requested summary dismissal of the AARP Petition because "it is not a rate schedule, tariff, agreement, contract or settlement and thus does not satisfy the procedural requirements of 30 V.S.A. § 218(e)."⁶

2. Docket 7535, Order of 8/11/09 at 1.

3. *Letter from Sarah Hofmann, Esq., on behalf of the Department, to Susan M. Hudson* dated August 11, 2009, at 1.

4. *Id.*

5. Docket 7535, Order of 9/21/09 at 1 (hereinafter the "Scope Order").

6. DPS Motion at 6. On July 28, 2010, the Department filed a revised version of the DPS Motion to add certain citations clarifying the source of the written arguments rendered therein. These revisions did not alter the substance of the DPS Motion in any way.

On July 2, 2010, AARP filed a response opposing the DPS Motion.⁷ That same day Vermont Electric Cooperative, Inc. ("VEC") filed a letter supporting the DPS Motion.⁸ In that letter, VEC stated that it was authorized to represent that the Group of Municipal Electric Utilities ("GMEU") supports the DPS Motion as well.

On August 6, 2010, International Business Machines Corporation ("IBM") filed comments supporting the DPS Motion.⁹

III. THE POSITIONS OF THE PARTIES

The Department

The Department contends that summary dismissal of the AARP Petition is appropriate because, as a matter of law, it does not satisfy the procedural requirements of Section 218(e). According to the Department, AARP's filing runs afoul of Section 218(e) because it does not consist of either a "rate schedule, tariff, agreement, contract, or settlement" ¹⁰ that would establish a low-income rates program that fits "within the economic parameters" ¹¹ set forth in Section 218(e). The Department submits that AARP has only proposed the issuance of a Board order that would require "the Electric Utilities and the Department of Public Service ... 'to collaborate and seek to develop an agreed upon memorandum of understanding establishing the policies and procedures of the program.'" ¹²

The DPS further contends that this filing defect in the AARP Petition reflects AARP's failure to submit the substantive economic analysis needed to ensure due consideration of "the potential impact on, and cost-shifting to, other utility customers" as mandated by the Legislature for the regulatory review of any low-income assistance program proposed for adoption pursuant

7. AARP Memorandum of Law In Opposition to DPS Motion for Summary Judgment dated July 2, 2010, at 14 (hereinafter "AARP Reply").

8. *Letter from Joslyn Wilschek, Esq., on behalf of VEC, to Susan Hudson*, dated July 2, 2010 (hereinafter the "VEC Letter").

9. *Letter from William J. McCarthy, Esq., on behalf of IBM, to Susan Hudson*, dated August 6, 2010 (the "IBM Letter").

10. 30 V.S.A. § 218(e).

11. DPS Motion at 2.

12. DPS Motion at 2 (quoting AARP Petition, Appendix A at 1).

to 30 V.S.A. § 218(e).¹³ The Department specifically argues that "the vagueness of AARP's petition" is such that "there is no economic analysis offered relative to the majority of the state's electric utilities, no proposed tariffs or rate schedules for scrutiny by the parties and consideration by the Board, and no realistic sense of the degree of ratepayer subsidization that the program would entail."¹⁴

AARP

AARP contends that summary dismissal of its petition would be inappropriate as a matter of law under Section 218(e) and as a matter of process due to alleged defects in the DPS Motion. First, AARP maintains that it was not required to file either a "rate schedule, tariff, agreement, contract, or settlement" in order to invoke the Board's jurisdiction to review the AARP Petition under Section 218(e). Second, AARP contends that the Department is advocating for an interpretation of Section 218(e) that is contradicted by "decades of PSB precedent and the wording of the statute."¹⁵ Third, according to AARP, the Department's construction of Section 218(e) would defeat the remedial purpose of that statute.¹⁶ Finally, the Department's application of Section 218(e) would improperly "bar AARP and many others from initiating the process"¹⁷ for obtaining Board approval of a means for providing "reduced rates for low income electric utility customers better to assure affordability."¹⁸

In addition to the foregoing statutory construction arguments, AARP asserts the existence of a variety of procedural defects in the DPS Motion that require its denial. First, AARP claims that the Department erroneously seeks to allocate the burden of proof in this docket to AARP. Secondly, AARP contends that the Department has failed to comply with the requirements of Rule 56(c) of the Vermont Rules of Civil Procedure for filing a Statement of Undisputed Facts in support of a summary judgment motion.

13. 30 V.S.A. § 218(e).

14. DPS Motion at 4-5.

15. AARP Reply at 1.

16. AARP Reply at 2.

17. *Id.* at 5.

18. 30 V.S.A. § 218(e).

IBM

IBM agrees with the Department that AARP's failure to file either a rate schedule, tariff, agreement, contract, or settlement should result in outright dismissal of the AARP Petition, and because the petition "fails to provide any analysis or data that will allow the Board to fully assess the petition's impact on utility customers."¹⁹

GMEU and VEC

GMEU and VEC have expressed support for the DPS Motion, but have not stated any specific or separate grounds for their position.²⁰

IV. DISCUSSION

Pursuant to Board Rule 2.219, V.R.C.P. 56 applies to Board proceedings. Summary judgment "is appropriate when, taking all allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law."²¹

AARP's petition was filed pursuant to 30 V.S.A. § 218(e), which provides as follows:

Notwithstanding any other provisions of this section, the board, on its own motion or upon petition of any person, may issue an order approving a rate schedule, tariff, agreement, contract, or settlement that provides reduced rates for low income electric utility consumers better to assure affordability. For the purposes of this subsection, "low income electric utility consumer" means a customer who has a household income at or below 150 percent of the current federal poverty level. When considering whether to approve a rate schedule, tariff, agreement, contract, or settlement for low income electric utility consumers, the board shall take into account the potential impact on, and cost-shifting to, other utility customers.

The Department contends — and AARP concedes — that the AARP petition has not presented "a rate schedule, tariff, agreement, contract, or settlement" for the Board to approve in this proceeding.²² Based on this undisputed fact — which the DPS considers to be material —

19. IBM Letter at 1-2.

20. VEC Letter at 1.

21. *Noble v. Kalanges*, 2005 VT 101, ¶ 16, 179 Vt. 1, 3 (2005).

22. DPS Motion at 2-3; AARP Reply at 2.

the Department insists that the AARP Petition must be summarily dismissed as a matter of law because the filing of such a document by the petitioner is required within the plain meaning of the language of Section 218(e) in order to obtain relief under that statute.²³

In turn, AARP counters that it was not required under the plain language of Section 218(e) to file "a rate schedule, tariff, agreement, contract, or settlement" in order to petition the Board to exercise its discretion to issue an order establishing reduced rates for low-income electric utility consumers.²⁴

I agree with the DPS that if the Board chooses to exercise its discretion in granting relief pursuant to Section 218(e), then the Board is required to do so by issuing an order that approves at least one of the variety of documents enumerated in the statute for capturing the substantive terms of a program to provide reduced rates for low-income electricity customers. However, this does not necessarily mean, as the Department suggests, that a petition filed under Section 218(e) must include a fully-developed "rate schedule, tariff, agreement, contract, or settlement" and that this filing must be submitted along with proof of supporting economic analysis by a petitioning party who is either a utility or a party to one of the "consensual documents" listed in the statute.²⁵ Rather, I note that Section 218(e) is silent about the review process that occurs in the procedural interval between the filing of a petition and the issuance of a Board order of approval under the purview of a statute. Significantly, there is no language in Section 218(e) that signals an express or implied legislative intent to foreclose – or otherwise curtail – the Board's customary process for independently investigating a proposed rate design and ultimately issuing an order approving any one of the kind of documents specified in Section 218(e).²⁶

The issuance of a Board order typically signifies the culmination of a regulatory review process in which the Board has independently scrutinized the filings and the evidentiary record to support the requisite findings of fact and conclusions of law that substantively constitute the

23. DPS Motion at 6.

24. AARP Reply at 1.

25. DPS Motion at 3-4.

26. An example of the Board's process for crafting a rate design may be found in the orders issued in Docket 5308. These orders document the Board's previous efforts to address the need to provide reduced rates for low-income electricity consumers in Vermont. *See* Docket 5308, *Board investigation into the adoption and implementation of energy programs for low-income households*, Order of 9/29/89; and Order of 3/9/93.

exercise of its jurisdiction. Indeed, this independent review process embodies the very Board scrutiny that the Department maintains is statutorily-mandated to ensure the "careful economic analysis of a prospective program under § 218(e)." ²⁷

The AARP Petition includes a proposed order directing the Department, AARP and, respectively, GMP and CVPS to apply a detailed set of terms in collaborating to develop a rate design that will provide reduced rates for low-income customers in the service territories of these two utilities.²⁸ Assuming the investigation now underway produces a sufficient evidentiary record, the next step in this docket may well be an interim Board order – whether along the lines of AARP's proposed order or otherwise – directing one or more Vermont utilities to perform whatever economic analysis that may remain to be done and that is necessary to file a rate schedule or tariff that complies with the low-income rate design criteria that may be established in this proceeding.²⁹ Then, depending on the quality of the compliance filing, the ultimate outcome of this docket may be the issuance of a final Board order approving a rate schedule or tariff that provides reduced rates for low-income electric utility customers.³⁰

I find it reasonable to conclude that the procedural steps I have described above are fairly implied in the language of Section 218(e) as the review process that may follow upon the Board's own motion or "upon petition of any person" for the Board to exercise its discretion pursuant to that statute. Accordingly, I find no merit in the Department's contention that the AARP Petition must be summarily dismissed as a matter of law for failure to include at least one of the documentary formats enumerated in Section 218(e).

Finally, I note that in making their respective arguments in regard to the proper construction of Section 218(e), neither the Department, AARP, GMEU, VEC nor IBM has addressed the legal implications of the Scope Order. In that Order, the Board expanded the scope

27. DPS Motion at 4.

28. AARP Petition - Appendix A.

29. It bears mentioning that such an interim order could further lead to a contract, agreement, or settlement among some or all of the parties to this docket. If so, then the parties to any such document would be in the position of seeking a Board order approving "a contract, agreement or settlement" as contemplated by Section 218(e).

30. I note that such a multi-order approach would be consistent with the statutory process for rate design proceedings that is outlined in § 218(a). *Heffernan v. Harbeson*, 2004 VT 98, ¶ 9, 177 Vt. 239, 861 A.2d 1149 ("When we interpret statutes, we presume that the Legislature was mindful of relevant precedents and prior legislation.")

of this docket to "include consideration of program-related issues, including design, that may have application beyond the service territories" of GMP and CVPS.³¹ Therefore, even if I were to grant summary judgment as a matter of law based on the Department's construction of Section 218(e), the dismissal of the AARP Petition would likely be of little consequence – it is probable that the expanded inquiry underway in this docket would nonetheless continue, given that it would seem the Board is acting "on its own motion" in conducting an investigation pursuant to Section 218(e) to determine whether it should ultimately issue an order that will provide reduced rates for low income electric utility consumers throughout Vermont, and not just in the service territories of GMP and CVPS.³²

In sum, for the reasons discussed herein, the DPS Motion is denied. Because I have rejected the Department's construction of 30 V.S.A. § 281(e) as a basis for granting summary judgment as a matter of law, there is no need for me to reach AARP's arguments concerning the alleged procedural defects of the DPS Motion.

SO ORDERED.

31. Docket 7535, Order of 9/21/09 at 2.

32. The Scope Order specifically states:

Having considered the comments we have received to date from the Department and other electric utilities who have expressed an interest in this investigation, we have decided to expand the scope of this proceeding to include consideration of the following issues that potentially could have general application to all electric utilities in Vermont:

1. Whether, and if so, to what extent, the central features of any program that may be established in the context of this proceeding may appropriately be extended to other Vermont electric utilities that may either choose to, or may become obligated to, establish a low-income rate program;
2. Whether an obligation to have a low-income program should extend to other Vermont electric utilities not named in AARP's petition, and
3. Whether all of the necessary or appropriate mechanisms that could be used under existing law to produce efficiencies or economies in the administration of a low-income rate program with more than one utility have been incorporated into the AARP proposal as reflected in AARP's pending petition.

The scope of this proceeding is hereby expanded to consider these issues. Given this expanded scope, all Vermont retail electric utilities shall be deemed joined in this proceeding and must file a notice of appearance.

Dated at Montpelier, Vermont, this 9th day of August, 2010.

s/ June E. Tierney
June E. Tierney, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: August 9, 2010

ATTEST: s/ Susan M. Hudson

Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)